No. 97-9361

In The

Supreme Court of the United States

October Term, 1998

LOUIS JONES, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I. THERE WAS AT LEAST A REASONABLE LIKELIHOOD THAT THE JURY INSTRUCTIONS AND VERDICT FORM LED THE JURY TO BELIEVE THAT DEADLOCK ON THE PENALTY RECOMMENDATION WOULD RESULT IN A COURT-IMPOSED SENTENCE LESS SEVERE THAN LIFE IMPRISONMENT.

A. It Was at Least Reasonably Likely That the Jury Misinterpreted the Jury Instructions and Verdict Form in the Fashion Urged by Petitioner.

Contrary to respondent's characterization, petitioner does **not** contend that the jurors believed that, in the event of nonunanimity as to penalty, "[they] would be required to **recommend** a sentence less severe than life without release." Resp. Br. 11 (emphasis added); *see also ibid.* at 8, 15-18. Rather, petitioner's contention is that, in the event of nonunanimity, the jury would have felt obliged to indicate its disagreement by returning the sentencing verdict form with Decision Form D (J.A. 59) signed by the jury foreperson – and that Decision Form corresponded to a sentencing outcome whereby (1) the court would impose sentence; and (2) said sentence would likely be a "lesser" sentence.

Respondent contends that, because the jury was explicitly told that any sentencing recommendation must be unanimous (J.A. 43), the jury could not reasonably have concluded that nonunanimity would result in any sentence, much less a less-than-life sentence. *See* Resp. Br. 14-15, 18-19. But the fact that any jury sentencing recommendation/verdict must be unanimous in order to be binding on the sentencing court, *see* 18 U.S.C. §§ 3593(e) & 3594, does **not** mean that there are no sentencing **consequences** flowing from nonunanimity. Nothing in these instructions told the jury there were not.[1]

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[1] Respondent's suggestion (Resp. Br. 17, 19, 28-29, 31, 33) that there is some sort of "background" presumption or rule, known to capital sentencing jurors, that nonunanimity results in a hung jury requiring another sentencing proceeding is without

Quite the opposite was true: the jury was led to believe that a failure to agree would require it to return the sentencing verdict form with Decision Form D signed by the jury foreperson.[2] *See* Pet. Br. 21-24.

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merit for the reasons discussed at pp. 9-10, *infra*. In reality, if there is any "background rule" of sentencing in American criminal law with which lay jurors are likely to be familiar, it is that sentencing is a duty of judges, not juries. Since jury sentencing in capital cases is the exception to this general rule, jurors would likely assume that the judge would take over the sentencing function if they failed to agree on the sentence to be imposed.

[2] In a nutshell, this was so for the following reasons: First, the jury was never told that it could return an uncompleted verdict form in the event of a deadlock on a sentence recommendation. On the contrary, the jurors were explicitly told to use Decision Forms C (life without release) or D ("some other lesser sentence") of that verdict form if, among other eventualities, "[they were] not unanimous in recommending that a sentence of death should be imposed." (J.A. 47-48). But the jury was told, both in the instructions (J.A. 48) and in Decision Form C itself (J.A. 58), that Decision Form C should be filled out if the jury unanimously recommended life without release. This left only Decision Form D for the nonunanimous jury.

And nothing in Decision Form D (J.A. 59) or the instructions pertaining to it (J.A. 48) suggested that unanimity was required for Decision Form D to be filled out. Indeed, the conspicuous absence of any reference to unanimity for this Decision Form suggested quite the opposite, as did the fact that only the jury foreperson was required to sign Decision Form D. (Decision Form B [death] and Decision Form C [life without release], in contrast, explicitly required unanimity and required the signatures of all the jurors.) Finally, the jurors would have been bolstered in their conclusion by the fact that, in contrast to their treatment of the death or life without release options, the instructions often omitted any mention of unanimity in connection with the "lesser sentence" option contained in Decision Form D. *See* Pet. Br. 21-22.

When the instructions and verdict form are viewed as a whole, it becomes clear that a deadlocked jury would likely have reconciled the instruction relied on by respondent with the later ones and with the verdict form by selecting Decision Form D as the only recourse available to it if its efforts to achieve unanimity failed – unless, of course, the minority jurors solved the problem by giving in to the majority.[3] Absent such a reconciliation, the instruction relied on by respondent was simply inconsistent with the court's subsequent instructions and with the verdict form, and was therefore insufficient to correct them. *See Francis v. Franklin*, 471 U.S. 307, 322-25 (1985); *Cabana v. Bullock*, 474 U.S. 376, 383-84 n.2 (1986). And returning the verdict form with Decision Form D signed clearly indicated to the jury that the court would impose "some other lesser sentence" – "other" and "lesser," that is, than death or life without release. Thus, it was **at least** reasonably likely that the jury instructions and verdict form in this case led the jury erroneously to believe that a deadlock on the penalty recommendation would result in a court-imposed sentence less severe than life imprisonment.[4]

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[3] Respondent is not assisted by its reliance (Resp. Br. 21) on the instruction (J.A. 44) that the jurors were "not to be concerned with the question of what sentence the defendant might receive in the event [they] determine[d] not to recommend a death sentence or a sentence of life without release," because "[t]hat [was] a matter for the court to decide in the event [the jury] conclude[d] that a sentence of death or life without release should not be recommended." While jurors are presumed to follow their instructions, jurors deadlocked between death or life without release would not believe that such an instruction pertained to them, because these jurors had not "determine[d] not to recommend a death sentence or a sentence of life without release."

[4] While the reasonable likelihood of this highly prejudicial juror misinterpretation is apparent from the instructions and verdict form themselves, respondent's insistence to the contrary is especially strained in light of the affidavits demonstrating

B. The Court Should Correct This Fundamental Error.

Respondent argues that, because petitioner did not object to the instructions and verdict form prior to their submission to the jury as required by Federal Rule of Criminal Procedure 30, any error is not subject to plenary review, but rather only "plain error" review under Federal Rule of Criminal Procedure 52(b). Resp. Br. 20-22. But Rule 30, by its own terms, applies only to "trial," whereas the FDPA carefully distinguishes the "trial" (on guilt/innocence) from the "separate sentencing hearing" at issue here.[5] Rule 52(b) is

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that **this** jury **actually** misinterpreted the instructions just as described. (J.A. 66-68, 78-80). Although the affidavits are not necessary to rule in petitioner's favor, this case is surely one of "the gravest and most important cases," *McDonald v. Pless*, 238 U.S. 264, 269 (1915), where refusal to consider them would "violat[e] the plainest principles of justice." *United States v. Reid*, 53 U.S. (12 How.) 361, 366 (1851). When – as here – jurors voluntarily come forward, on their own initiative, and inform the court that they agreed to a death sentence based upon a fundamental misunderstanding of their instructions, courts should not turn a blind eye to such compelling evidence. Respondent's concerns about post-verdict juror harassment by disappointed litigants (Resp. Br. 23) may be adequately addressed by local rules of court prohibiting litigants or their attorneys from contacting jurors without leave of court. *See, e.g.*, N.D. TEX. LOC. CRIM. R. 24.1.

Finally, contrary to respondent's suggestion (Resp. Br. 22 n.5), the question whether these affidavits may be considered is "fairly included" within the question whether the jury was reasonably likely to have misinterpreted the instructions and verdict form. *Cf. United States v. Zolin*, 491 U.S. 554, 564 n.8 (1989). Indeed, here, unlike in *Zolin*, the subsidiary question was explicitly ruled on by the Court of Appeals (J.A. 104-106) and expressly mentioned in petitioner's pleadings in this Court as "fairly included." Pet. Rply. to Br. Opp. 7 n.4.

[5] *See, e.g.*, 18 U.S.C. § 3593(b) (if defendant is found guilty, "judge who presided at the **trial** . . . shall conduct **a separate sentencing hearing** to determine the punishment to be imposed") (emphasis added); *see also* 18 U.S.C. § 3593(b)(2)(B) (again distinguishing between sentencing "hearing" and the "trial" on guilt/innocence).

likewise inapplicable because it applies only where the particular error was "not brought to the attention of the court." FED. R. CRIM. P. 52(b). Here, the error **was** brought to the attention of the district court, both by petitioner's proposed instructions and indisputably by petitioner's post-sentencing motions. (J.A. 60-68, 75-80).

But even if the error were not properly preserved, plenary review is nonetheless required under the "arbitrary factor" review compelled by the FDPA.[6] *See* 18 U.S.C. § 3595(c)(1). As discussed in petitioner's opening brief (Pet. Br. 26-28), other jurisdictions with "arbitrary factor" review of death sentences (whose views Congress must be presumed as having adopted by its adoption of the "arbitrary factor" language) have held that instructional errors – and particularly instructional errors of the type at issue here – may interject impermissible "arbitrary factors" into the imposition of the death penalty.[7] And these "arbitrary

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[6] Contrary to respondent's contention (Resp. Br. 26 n.6), this statutory claim is properly before the Court. First, it is fairly included within the wording of the question presented as framed by the Court on its grant of certiorari (the same wording, notably, as in respondent's Brief in Opposition). Moreover, the statutory claim was raised and litigated in the Court of Appeals. Finally, because the Court must consider nonconstitutional grounds for decision prior to reaching constitutional questions, *see Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981), petitioner's claim that jury misinterpretation of the jury instructions and verdict form interjected an "arbitrary factor" under the FDPA is fairly included in his claims that such misinterpretation violated his constitutional rights. *Cf. Caspari v. Bohlen*, 510 U.S. 383, 389-90 (1994) (*Teague* retroactivity issue was fairly included within question raising correctness of constitutional ruling on the merits).

[7] While apparently conceding that the term "arbitrary factor" in the FDPA should be interpreted in light of the meaning given to

factor" jurisdictions have reviewed these instructional errors **irrespective of whether the error was properly preserved by objection.**[8] *See* Pet. Br. 26-27 n.22.

Indeed, Congress further indicated its adoption of this rule for appellate review under the FDPA when it specified that the third, error-correction prong of review under the statute would be limited to errors that were "properly preserved for appeal under the rules of criminal procedure." 18 U.S.C. § 3595(c)(2)(C). The obvious inference from this specific reference to error-preservation is that Congress did not intend to require such preservation for sentence review for "passion, prejudice, or any other arbitrary factor" under § 3595(c)(2)(A).[9] *See, e.g., Lindh v. Murphy*, 521 U.S. 320, ___, 117 S.Ct. 2059, 2063-65 (1997).

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that term in the jurisdiction(s) from which Congress borrowed it, respondent asserts, without authority, that only the interpretation given by the courts of **Georgia** is relevant. Resp. Br. 27 n.8. There is no warrant for such a limitation. Although the FDPA's "arbitrary factor" language may have originated in the Georgia statute reviewed by this Court in *Gregg v. Georgia*, 428 U.S. 153 (1976), Congress was surely also aware of the constructions given to the identical language in other "arbitrary factor" state jurisdictions. In any event, Georgia has also held that instructional error may interject or constitute an "arbitrary factor" within the compass of the Georgia statute. *See, e.g., Conner v. State*, 251 Ga. 113, 121, 303 S.E.2d 266, 275 (collecting examples), *cert. denied*, 464 U.S. 865 (1983); *Spraggins v. State*, 240 Ga. 759, 763, 243 S.E.2d 20, 23 (1978).

[8] This is true even in Georgia, which is apparently the only "arbitrary factor" jurisdiction whose jurisprudence respondent accepts as relevant in interpreting the FDPA. *See, e.g., Conner*, 251 Ga. at 121, 303 S.E.2d at 275 (under "broad" review for "arbitrary factors," "[w]e have set aside death penalties where the trial court failed to properly charge the jury at the sentencing phase, **whether or not such failure was objected to at trial or raised on appeal**") (emphasis added and citations omitted).

[9] Independent "arbitrary factor" review under the FDPA assumes even greater importance in this particular case. Because this case was the very first trial in the nation conducted

Contrary to respondent's suggestion (Resp. Br. 26-27), petitioner does **not** argue that **every** legal error in a death penalty proceeding will interject, or constitute, an "arbitrary factor" correctable despite lack of objection by the defendant.[10] Rather, "arbitrary factors" are probably best understood as a discrete subset of errors going to the very heart of the reliability and accuracy of the capital sentencing determination. But this case does not require the Court to define the limits of what is, and what is not, an "arbitrary factor" under the FDPA because the error in this case clearly qualifies.

In sum, the jury was at least reasonably likely to have misinterpreted the instructions and verdict form as petitioner urges. This highly prejudicial[11] error interjected an

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under the newly-enacted FDPA procedures, petitioner would encounter special problems in establishing that this or almost any other procedural error at sentencing was sufficiently "plain" or "obvious" to warrant correction under Fed. R. Crim. P. 52(b). But to carry out a death sentence imposed by means of a grossly flawed procedure, simply because neither the court nor counsel knew quite how to implement the FDPA in the first run-through, would be an intolerable violation of the principle that "any decision to impose the death penalty be, and appear to be, based on reason rather than caprice and emotion." *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality op.). Independent review for "arbitrary factors" thus serves an important "safety net" function, ensuring that no defendant will be executed due to the courts' and counsel's inexperience with a novel sentencing procedure.

[10] For example, mere technical errors (*e.g.*, an error in laying the foundation for documents whose reliability is not questioned) or other errors that do not impugn the reliability or accuracy of the death penalty determination (*e.g.*, the admission of otherwise reliable evidence obtained in violation of the Fourth Amendment) would not qualify as "arbitrary factors" correctable despite the lack of objection.

[11] Quoting the Court of Appeals, respondent disputes any claim of prejudice, claiming that "the outcome could just as

"arbitrary factor" into the proceedings and violated petitioner's constitutional rights.

II. PETITIONER WAS ENTITLED TO A JURY INSTRUCTION THAT THE JURY'S FAILURE TO AGREE ON A SENTENCING RECOMMENDATION WOULD RESULT IN A COURT-IMPOSED SENTENCE OF LIFE IMPRISONMENT WITHOUT POSSIBILITY OF RELEASE.

A. Petitioner's Proposed Instructions Correctly Stated the Law.

In disputing petitioner's contention that a jury deadlock would cause court-sentencing under 18 U.S.C. § 3594, respondent again argues that "the FDPA requires jury unanimity for any sentencing recommendation." Resp. Br. 29, *citing* 18 U.S.C. § 3593(e). This is true as far as it goes: any jury sentencing "recommendation" (*i.e.*, binding disposition which the court must enforce under § 3594) must indeed be unanimous. But § 3593(e) says nothing about the situation in which the jury is **not** unanimous and hence does **not** return a "recommendation" under the FDPA. That situation is, as discussed in

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easily have turned out the other way with the jurors not supporting the death sentence convincing the death prone jurors to impose life without the possibility of release." Resp. Br. 22. Even if this doubtful assertion were correct, the instructional error here still introduced an unacceptable level of arbitrariness into the sentencing process. *See Beck v. Alabama*, 447 U.S. 625, 643 (1980) ("In any particular case these two extraneous factors may favor the defendant or the prosecution or they may cancel each other out. But in every case they introduce a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case."). Capital sentencing should not be transformed into a game of "chicken," in which life or death turns on the completely random happenstance of whether the particular "life" jurors or "death" jurors in each case will be the first to give in, in order to avoid a perceived third sentencing outcome unacceptable to either set of jurors.

petitioner's opening brief, Pet. Br. 33-35, covered by the "otherwise" clause of § 3594.[12]

Respondent also attempts to rely on some sort of "background" rule that "the government is entitled to retry a case if the jury cannot reach a unanimous verdict." Resp. Br. 29; *see also ibid.* at 17, 19, 28-29, 31, 33. There is no such "background" rule for capital sentencing proceedings. The authority cited by respondent is for trials on guilt or innocence and has no relevance to the bifurcated sentencing proceeding at issue here – a creature of relatively recent origin. Indeed, respondent undermines its own case for a background rule by pointing out the large number of state jurisdictions in which nonunanimity results in a noncapital sentence by the court and the relative paucity of capital sentencing schemes that require a new sentencing hearing when the sentencing jury hangs. *See* Resp. Br. 32 & Apps. A & B.

In fact, the **true** background rule against which the FDPA was enacted was precisely the opposite. The FDPA is closely patterned after the capital sentencing procedures of the Anti-Drug Abuse Act of 1988 (ADAA), 21 U.S.C. § 848(e)-(r) – which statutes include a similar "otherwise" clause[13] that has been unanimously construed to mandate

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[12] Respondent's argument (Resp. Br. 30) that the "otherwise" clause pertains only to the situation where the jury unanimously recommends a lesser sentence not only disregards the plain meaning of the word "otherwise"; it also fails to take account of the differences between the first and second sentences of § 3594. If Congress had intended for the statute to read as respondent argues, Congress could easily have made the second sentence parallel with the first sentence, as follows: "**Upon a recommendation under section 3593(e) that the defendant should be sentenced to some other lesser sentence**, the court shall impose any lesser sentence that is authorized by law." But Congress did not do so, and that failure is telling.

[13] Under 21 U.S.C. § 848, the jury "by unanimous vote . . . shall recommend that a sentence of death shall be imposed rather than a sentence of life imprisonment without

that a jury's failure to achieve unanimity on the sentencing recommendation results in court-sentencing.[14] By incorporating § 848's "otherwise" language into the FDPA, Congress must be presumed to have known how that language had been judicially interpreted, *see Lorillard v. Pons*, 434 U.S. 575, 581 (1978), and to have ratified that interpretation.[15] *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 385-86 (1983).

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possibility of release or some other lesser sentence." 21 U.S.C. § 848(k). "Upon the recommendation that the sentence of death be imposed, the court shall sentence the defendant to death. Otherwise the court shall impose a sentence other than death authorized by law." 21 U.S.C. § 848(l).

[14] *See, e.g., United States v. Chandler*, 996 F.2d 1073, 1086 (11th Cir. 1993); *United States v. Spivey*, 958 F.Supp. 1523, 1526-27 (D.N.M. 1997); *United States v. Pitera*, 795 F.Supp. 546, 552 (E.D.N.Y. 1992).

[15] To be sure, the FDPA differs from the ADAA in one respect. Under the ADAA, the only binding recommendation a jury could make was one of death. The FDPA, on the other hand, allows the jury, by unanimous vote, to make any of **three** binding sentence recommendations: death, life without release, or some other lesser sentence. But nothing in the legislative history of the FDPA indicates that this variance was intended to displace the "deadlock-equals-court-sentencing" rule of the ADAA. Indeed, as petitioner has already pointed out, Pet. Br. 34-35, the only mention of a hung jury in the entire legislative history of the FDPA is found in H.R. Rep. No. 103-467 (1994) (explaining the House Judiciary Committee version of the virtually identical Senate bill which ultimately became the FDPA), which specified that if a jury failed to reach a unanimous decision under § 3593, "the judge shall impose the sentence pursuant to Section 3594."

The best explanation for Congress's selection of the three-way sentencing option of the FDPA is that Congress wished to avoid a problem identified by this Court's then-recent decision in *Simmons v. South Carolina*, 512 U.S. 154 (1994). In *Simmons*, the Court held that where the actual alternative to the death penalty is life without possibility of parole, and where the prosecution relies on the defendant's alleged future dangerousness as a reason favoring the death penalty, due process requires that the

Nor is respondent assisted by its reliance (Resp. Br. 29, 31) on 18 U.S.C. § 3593(b)(2), which permits a separate sentencing hearing "before a jury impaneled for the purpose of the hearing if . . . the jury that determined the defendant's guilt was discharged for good cause." Respondent claims that, unless the phrase "discharged for good cause" is interpreted to include a jury discharged because of unbreakable deadlock, § 3593(b)(2) is rendered meaningless. This claim is incorrect: there are many reasons why a jury may be discharged besides jury deadlock, *e.g.*, exposure to prejudicial extrinsic information or publicity, or juror illness resulting in diminution of the jury panel to a number below the permissible complement of jurors.

In sum, petitioner's reading is not only compelled by the plain text of the statutes involved; it is the reading which best harmonizes all of the provisions of the FDPA.

B. Petitioner Was Entitled to an Instruction on the Effect of Jury Deadlock.

Respondent objects that an instruction on the effect of jury deadlock "would be an open invitation for the jury to

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sentencing jury be informed about the defendant's ineligibility for parole. A binary choice between a unanimous jury recommendation of death or not (like that in the ADAA) risked violating *Simmons*, at least in cases (like this one) where life imprisonment was the only statutorily-authorized alternative to the death penalty, and where (as in most federal death penalty prosecutions) the prosecution alleges future dangerousness as a nonstatutory aggravating factor.

Thus, it is most likely that the FDPA's three-way jury sentencing option simply reflects the fact that Congress, to avoid a *Simmons* problem, wished to empower the jury to select from the full range of available punishments. Because unanimity is a normal feature of jury decisionmaking, the requirement that any of the jury's choices be unanimous does not reflect any intent to import into capital sentencing the guilt-phase rule that a hung jury results in a mistrial and a retrial before a new jury.

avoid its responsibility and to disagree," which "would frustrate the strong interest in jury unanimity, which is a bedrock principle of our jury system." Resp. Br. 35 (internal quotation marks and citation omitted). But these fears are groundless. First, juries are generally instructed – as was the jury in this case – that

> **[i]t is your duty as jurors to discuss the issue of punishment with one another in an effort to reach agreement, if you can do so.** Each of you must decide this remaining question for yourself, but only after full consideration of the evidence with the other members of the jury. **While you are discussing this matter, do not hesitate to re-examine your own opinion, and to change your mind if you become convinced that you are wrong.** But do not give up your honest beliefs as to the weight or effect of the evidence solely because others think differently or simply to get the case over with.

(J.A. 46) (emphasis added). Because jurors are presumed to follow their instructions, *see Richardson v. Marsh*, 481 U.S. 200, 206 (1987), there is no reason to believe that jurors will disregard their oaths and fail to comply with the instruction that they should reach agreement if possible.[16] That being the case, there is no reason to withhold from juries the fact that their failure to agree on a sentence will itself result in a sentence.[17]

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[16] Moreover, under this Court's decision in *Witherspoon v. Illinois*, 391 U.S. 510 (1968), and its progeny, only persons who are capable of considering either death or non-death sentences are permitted to serve on capital sentencing juries. Thus, there is even less likelihood of "rogue" jurors who will derail deliberations and hang the jury simply to achieve one outcome or another.

[17] Indeed, quite the opposite is true: it is "desirable for the jury to have as much information before it as possible when it makes the sentencing decision." *Gregg v. Georgia*, 428 U.S. 153, 204 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.).

But whether or not one agrees that juries should always be told of the consequences of deadlock, there can be no disagreement that juries should not be given an **inaccurate** or **misleading** impression of what those consequences might be – as the jury in this case was.[18] A jury deadlock instruction was necessary in this case to correct the erroneous impression, conveyed by the instructions and verdict form actually submitted, that jury deadlock would result in a court-imposed less-than-life sentence. Accordingly, the Court should reverse the judgment below.

III. THE SUMMARY ASSERTION OF HARMLESS ERROR BY THE COURT OF APPEALS, WITHOUT ANY ANALYSIS OR EXPLANATION BASED UPON THE RECORD, REQUIRES REVERSAL.

A. The Two Nonstatutory Aggravating Factors Found by the Jury Were Vague, Overbroad, and Duplicative.

Relying almost entirely on *Tuilaepa v. California*, 512 U.S. 967 (1994), respondent faults the Court of Appeals' holding that two aggravating factors found by the jury were vague, overbroad, and duplicative. Resp. Br. 39. But respondent overlooks the critical difference between a weighing statute like the FDPA, and a nonweighing statute like California's.[19] In California, statutory aggravating circumstances serve only to render the defendant death-eligible. At that point, the jury is instructed to consider a lengthy list of factors (some

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[18] *See Gregg, id.*, at 190 ("accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision").

[19] "The difference between a weighing State and a nonweighing State is not one of semantics . . . but of critical importance." *Stringer v. Black*, 503 U.S. 222, 231-32 (1992). In a weighing jurisdiction it is especially important that "aggravating factors be defined with some degree of precision." *Stringer*, 503 U.S. at 229.

aggravating, and some mitigating) in deciding whether to impose the death penalty. The jury is not required to make specific findings as to each factor, nor to weigh in aggravation any of the particular factors.

Under the weighing statute in this case, by contrast, jurors were required to answer either "yes" or "no" as to the existence of each of the aggravating factors.[20] (J.A. 51-53). Petitioner's jury was also instructed that they **must** consider in the weighing process **each** aggravating factor that they found beyond a reasonable doubt, and they were not to consider any aggravating factors not so proven. (J.A. 43).

Because Congress chose to adopt a weighing statute in which aggravating factors channel and guide the jury's discretion, each aggravator must actually serve that narrowing function. If a factor is too vague to guide the jury's discretion, that factor is invalid. *See Stringer*, 505 U.S. at 235 ("Although our precedents do not require the use of aggravating factors, they have not permitted a State in which aggravating factors are decisive to use factors of vague or imprecise content.").

The nonstatutory aggravating factors that were submitted in this case were so vague that the jury could not rationally "find" them beyond a reasonable doubt, or by any other standard of proof. Factor 3(B) required the jury to "find," among other things, the defendant's "background";

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[20] The Court in *Tuilaepa* drew a distinction between "propositional" and "nonpropositional" aggravating factors. A propositional factor requires the jury to make a finding whether the factor has been proved; when such propositional factors are vague, it creates "an unacceptable risk of randomness, the mark of the arbitrary and capricious sentencing process prohibited by *Furman v. Georgia*, 408 U.S. 238 (1972)." *Id.* at 974-75. A nonpropositional factor, on the other hand, does not require a "yes" or "no" answer to a specific question, but instead only points the sentencer to a subject matter that is not required to be weighed as an aggravating factor. Such factors – as the selection stage factors were in California – need not be defined with the same precision. *Id.*

Factor 3(C) required the jury to "find" the victim's "personal characteristics." A jury could not possibly "find" whether the victim's "background" or her "personal characteristics" had been proved beyond a reasonable doubt. Thus, the jury's interpretation of the aggravating factors "can only be the subject of sheer speculation." *Godfrey v. Georgia*, 446 U.S. 420, 429 (1980).

Respondent asserts that because the challenged aggravating factors were nonstatutory, they need not meet the same standard as statutory aggravating factors. Again, respondent has confused what is **permissible** under a statute such as California's with what is **required** under the FDPA. Consistent with the FDPA, *see* 18 U.S.C. § 3593(e), the jurors here were instructed that they "must weigh any aggravating factors that they unanimously found to exist – whether statutory or nonstatutory. . . . " (J.A. 43). And contrary to respondent's assertion that the jury must find that a factor "aggravated the crime before the factor could be weighed" (Resp. Br. 44), the jury was given no such instruction. The jury was required only to make a finding that the factor had been proved to be factually true. If the jury so found, it had to weigh the factor as aggravating – that is, it was required by the instructions to place the factor on death's side of the scale.

In defending the validity of Factors 3(B) and 3(C), respondent stresses that sentencing juries may consider the background and personal characteristics of the victim. Resp. Br. 41. Petitioner does not contend otherwise. The problem with these factors is the unacceptably vague wording, combined with the FDPA's requirement that every factor found be weighed, and weighed as evidence supporting a death sentence. Nothing in the wording of Factor 3(B) makes clear to the jurors that they should focus on the "particular vulnerability" of the victim. Additionally, the vagueness of Factor 3(C) (concerning the victim's personal characteristics) could lead to the type of "comparative judgment" the Court disapproved in *Payne v. Tennessee*, 501 U.S. 808, 823 (1991): the jury could have weighed the victim's relative worth to

the community, or impermissibly compared the victim's and the defendant's race or appearance or socioeconomic status.

Absent any explanation of how the victim's "background" and her "characteristics" exacerbated the defendant's culpability, those factors could fairly be found in every homicide, and are accordingly unconstitutional. *Arave v. Creech*, 507 U.S. 463, 474 (1993). This vagueness and overbreadth is particularly problematic because the two factors substantially duplicate and overlap each other. Respondent argues that the two factors do not overlap because they were intended to direct the jury's attention to separate areas of aggravation. But, as the Court of Appeals held, the plain meaning of the term "personal characteristics" used in 3(C) necessarily includes "young age, slight stature, background, and unfamiliarity" which the jury was required to consider under 3(B). (J.A. 118). Duplicative aggravating factors in a weighing statute like the FDPA necessarily skew the weighing process in favor of death.[21]

Plainly, Congress did not intend for the government to rely upon vague, overbroad, and duplicative aggravating ... such as these. This Court should make clear to other

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[21] As the Tenth Circuit has held in *United States v. McCullah*, F.3d 1087, 1112 (10th Cir. 1996), "the mere finding of an aggravating factor cannot but imply a qualitative value to that factor." The court concluded that

> [T]he use of duplicative aggravating factors creates an unconstitutional skewing of the weighing process which necessitates a reweighing of the aggravating and mitigating factors.
>
> To the extent that Congress wants a particular aggravating factor to receive enhanced weight in the sentencing process, it can provide for such enhancement in the statute itself. However, Congress elected not to do so, and the prosecutor cannot attempt to circumvent Congress's inaction by introducing the same factor in a different guise a second time.

lower federal courts construing this statute that aggravating factors such as these are impermissible under the FDPA.

B. Respondent Has Not Proved that the Errors are Harmless Beyond a Reasonable Doubt.

Respondent cites no cases that have upheld a harmless error determination as perfunctory as the one performed by the Court of Appeals here. Resp. Br. 49-50. Rather, respondent essentially asks this Court to perform its own harmless error analysis, and proposes two ways in which the Court might do so. Resp. Br. 45-49.

First, respondent asks this Court to find, beyond a reasonable doubt, that the result would have been the same had the invalid aggravating factors been properly defined.[22] In an attempt to carry that burden, respondent has rewritten the factors and converted them into a propositional form.[23] Resp. Br. 46. But respondent's reformulation does more than

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[22] In this argument, respondent relies upon a statement from *Clemons v. Mississippi*, 494 U.S. 738, 754 (1990), in which this Court noted that "[i]t is perhaps possible" that the state supreme court had considered whether "beyond reasonable doubt the result would have been the same had the [invalid] aggravating circumstance been properly defined in the jury instructions." But this Court has never actually approved such a mode of harmless error analysis. Moreover, even if such analysis were permissible in some cases, it would be inappropriate here. In *Clemons* the vague aggravator at issue – whether the murder was "especially heinous, atrocious, or cruel" – had previously been given a fixed, narrowed definition by the Mississippi Supreme Court. Thus, it was clear in Mississippi what the properly defined aggravating factor was meant to encompass. Determining whether the jury in this case would have found aggravating factors that respondent has reformulated for the first time in this Court is a more speculative undertaking.

[23] By reformulating the aggravating factors, respondent implicitly concedes both aspects of the vagueness problems identified by petitioner – the nonpropositional nature of the factors, and the fact that, as written, the factors do not aggravate this homicide.

convert the grammatical structure of the two factors; the changes are not "minor." Rather, respondent has inserted crucial wording into both factors in order to narrow and guide the jury's discretion. The reformulation of Factor 3(B) adds an assertion that the victim was "particularly vulnerable" because of certain characteristics; the reformulation of Factor 3(C) adds an assertion that the murder "caused exceptional harm" because of the victim's personal characteristics.

Respondent then **assumes** that the jury would have made affirmative findings as to those reformulated questions. However, under this test, respondent's statutory burden is to **prove** beyond a reasonable doubt that the result would have been the same had the rewritten factors been submitted to the jury. But respondent's speculations and assumptions about what the jury would have found omit an important aspect of this record: clearly, the jury did not take the most adverse possible view of petitioner's crime or his character. For example, the jury rejected three aggravating factors alleged by the prosecution: that petitioner committed the murder "after substantial planning and premeditation"; that the "defendant constitutes a future danger to the lives and safety of other persons"; and that he "knowingly created a grave risk of death to one or more persons in addition to the victim." These findings indicate that at least some of the jurors rejected the government's portrait of petitioner as a predatory cold-blooded killer, and viewed the murder as an impulsive or even aberrational act. Moreover, jurors found that the defendant had proved the existence of **eleven** mitigating factors.

Given these other findings by the jury, it cannot be known beyond a reasonable doubt that the jury would have found the reformulated factors. It is not surprising that the jury "found" the victim's "young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas"; it does not follow that the jury would have also found that the victim – a soldier in the United States Army – was "particularly vulnerable" in a way that exacerbated petitioner's culpability. Likewise, although the jury "found" the victim's "personal characteristics," it does not follow that the

jury inevitably would have found that the murder caused "exceptional harm" that aggravated this homicide. Moreover, it cannot be known that the jury would have accorded the same weight to those more narrow reformulated factors that it did to the vague and overbroad factors actually submitted to the jury.

Alternatively, respondent argues that this Court should find that the result would have been the same had the two aggravating factors not been submitted to the jury at all because the government "did not dwell" (Resp. Br. 48) on the invalid factors in the sentencing phase. Resp. Br. 47-49. Respondent's own brief refutes this claim. In its argument that the jury would have made affirmative findings as to its "reformulated" aggravating factors, respondent emphasizes the importance of the two factors in the government's case, and cites at least ten different references to the nonstatutory aggravating factors in the prosecutor's opening statement and closing argument at the sentencing phase.[24] *See* Resp. Br. 46 and App. A-7 – A-10.

This inconsistency in respondent's brief demonstrates that any assertion concerning how much weight the jury gave to the aggravating factors at issue is sheer speculation. As this Court has noted, "when the sentencing body is told to weigh an invalid factor in its decision, a reviewing court

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[24] Also, as respondent notes (Resp. Br. 48), the evidence at the sentencing phase included all the evidence presented at the guilt phase. Much of that evidence related to the background and the characteristics of the victim.

Furthermore, in considering the relative importance of the evidence and argument relating to the invalid factors, it must be noted that much of the government's evidence and argument was designed to prove the three aggravating factors that the jury failed to find. For example, much of the prosecution's closing argument was designed to convince the jury to find that the petitioner committed this crime after substantial planning and that he would constitute a future danger. As a result, the evidence and argument relating to the invalid aggravators took on added importance.

may not assume it would have made no difference if the thumb had been removed from death's side of the scale." *Stringer v. Black*, 503 U.S. 222, 232 (1992).

Moreover, as demonstrated in petitioner's opening brief, the jury struggled with a close and difficult decision. The quantity and quality of mitigating evidence, and the jury's refusal to find three of the aggravating factors submitted by the government, indicate that the jury's decision was anything but a foregone conclusion. This record cannot support a finding beyond a reasonable doubt that the result would have been the same even without two of the four aggravating factors considered by the jury. In short, the record in this case makes a finding of harmless error "extremely speculative or impossible." *Clemons v. Mississippi*, 494 U.S. 738, 754 (1990).

CONCLUSION

The judgment of the United States Court of Appeals should be reversed.

Respectfully submitted,

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